COMCAST®
CORPORATION

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December 31, 1992

Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Broadcast Signal Carriage Issues - MM Docket No. 92-259

Comments of Comcast Corporation

Dear Ms. Searcy:

Enclosed are an original and nine copies of Comments submitted by Comcast Corporation in connection with the above-referenced Docket.

Very truly yours,

Thomas R. Nathan

THOMAS R. NATHAN
Deputy General Counsel

TRN/amc
enc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection and	)	MM Docket No. 92-259
Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

To the Commission:

COMMENTS OF COMCAST CORPORATION

Comcast Corporation hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. Comcast subsidiaries and affiliates provide cable television service to over 2.5 million subscribers throughout the United states.

INTRODUCTION

Sections 614 and 615 of the Cable Television Consumer Protection Act of 1992 (the "Act") feature a blend of old and new concepts. Must carry appears in its third incarnation, but this time based on ADI markets rather than the city of license zones used in both the 1972 and 1987 rules. For the first time low-power television stations are granted limited must-carry rights and broadcasters have been given the ability to withhold their signal from the market. The issues raised in the Notice demonstrate the

Commission's awareness that integrating these requirements with current law and traditional signal carriage practices will require adroit implementation.

A common thread which runs through our comments is that delay, uncertainty and unnecessary changes must be held to minimum. A cable operator's business consists of selling and servicing the delivery of signals to subscribers. Vacillations in the rules governing signal carriage impair an operator's ability to make definite plans concerning its signal line-up and this, in turn, is a source of subscriber frustration and dissatisfaction. We respectfully request the Commission not to lose sight of this reality, whether or not it finds merit in the specific proposals which follow.

I. SIMPLE AND EQUITABLE METHODS OF REVISING ADI MARKETS EXIST WHICH WOULD REQUIRE LITTLE COMMISSION PARTICIPATION.

The Act provides that a television station's market shall be determined according to Arbitron's Area of Dominant Influence (ADI). Recognizing that the use of ADIs may result in inequities, Congress has authorized the Commission to add and delete communities from a station's ADI and to determine when a community belongs to more than a single market.

A problem can occur where an ADI is either over-inclusive or under-inclusive. An example of an over-inclusive is a technically-integrated system which serves subscribers located in more than one ADI. Because of its technical configuration, it has no way to deliver different line-ups to the subscribers in their respective

markets. Without some relief from the Commission, the system will be subject to multiple must carry obligations. This is true, even if a de minimus portion of the system is implicated. By contrast, the problem of an under-inclusive ADI is where the ADI does not include signals which have historically been viewed by large numbers of residents in the geographic area represented by the ADI.

The procedures which the Commission adopts must be swift and certain if cable television subscribers are to be spared the disruption resulting from numerous changes in the system's market definition. For this reason, Comcast approves of the Commission's intention to utilize the expedited-relief procedures available under Section 76.7 and proposes the largely self-executing schemes for over and under-inclusive markets described below.

A. THE OVER-INCLUSIVE MARKET

Comcast's Georgetown, Delaware system is an example of the over-inclusive ADI problem. The system primarily serves residents of Sussex County, Delaware which is located in the Salisbury, Maryland ADI. However, the system also serves approximately 1000 customers (four percent of its subscriber base) who reside in Kent County, Delaware which is located within the Philadelphia ADI. The Kent County subscribers and the Sussex County subscribers are served from a common headend.

A simple and fair solution to the over-inclusive ADI situation is for the Commission to establish a threshold (perhaps expressed as a percentage of the system's subscribers) below which a system may automatically elect to be governed by the carriage obligations

of its dominant ADI. By requiring a cable operator to simply provide notice of its election to the Commission and any affected television stations, the Commission would have in place an equitable, efficient and largely, self-executing scheme. Ad hoc Commission determinations would be unnecessary except for situations lacking a clearly dominant ADI. To further ensure fairness and safeguard against manipulation, the Commission could require any such election by a cable operator to be irrevocable for a fixed period of years.

B. THE UNDER-INCLUSIVE MARKET

In considering a request for revised market determination under Section 614(h)(1)(C), the Act instructs the Commission to pay particular attention to the value of localism by taking into account at least three specific factors: (i) historical carriage of the station by the cable system or systems in the communities subject to revision; (ii) coverage of news or events of interest in the community; and (iii) evidence of viewing patterns within the community. Although some petitions will undoubtedly have to be dealt with on a more individualized basis, Comcast suggests that there already exists an established and accepted standard which encompasses all of the factors identified by Congress: the significant viewing standard incorporated in Section 76.54 of the following Commission's rules.

There can be no doubt that in many cases historical subscriber viewing patterns will be disrupted by the move away from the Commission's traditional community of license standard to an ADI

standard. Comcast proposes that the continued use of significant viewing status could greatly ameliorate these dislocations. Indeed, significant viewing status was established by the Commission in connection with its 1972 must carry rules precisely as a method of determining when a station from outside the market should be considered present within the market.[1] For over 20 years, significant viewing status has continuously been an integral element in every Commission rule relating to signal carriage.[2] There are plentiful reasons why this concept should have continued vitality.

Consider, for example, the case of Comcast's Washington, New Jersey system, a 38 channel system located within the New York ADI but equidistant between New York and Philadelphia. The New York ADI contains a pool of eligible must carry stations (fourteen) greater than the system's must carry quota, which is thirteen. The system has historically carried three stations from Philadelphia which are significantly viewed. Unless these three stations are considered present in the New York market and their carriage counted for purposes of its must carry quota, the system faces the agonizing choice of either deleting satellite-delivered signals for less popular off-air New York signals or ceasing carriage of the

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[1]Cable Television Report and Order, 36 FCC 2d 143, 173 (1972).

[2]Significant viewing status continues to be an important distinction under current regulations. Significantly viewed stations are not subject to blackout under either the Commission's network non-duplication or syndicated exclusivity rules. And significantly viewed stations remain local for copyright purposes

Philadelphia signals altogether. A rule which supplements a television station's market by adding to it communities in which it is significantly viewed would preserve historical viewing patterns, maintain localism and minimize subscriber discontent.

The use of significant viewing status to measure compliance with the criteria set forth in Section 614(h)(1)(C) would be predominately self-executing. Both cable operators and stations would be entitled to petition for expansion of the station's market. The petition would be limited to a demonstration that the station has been declared significantly viewed by the Commission in accordance with the procedures established in Section 76.54 of its rules. Since the list of significantly viewed stations is published and widely available, there would be few contested petitions.

This proposal is not intended to modify any otherwise applicable must carry rules. It is aimed solely at establishing a logical, fair and expeditious method for dealing with requests for market extension under Section 614(h)(1)(C). A station which by virtue of significant viewing is deemed to be present within the local market would be treated as an additional eligible must carry, and would be subject to all the must carry rules. It would be neither more nor less favored than any other station present in the Market. If carried, its carriage would count toward a system's must carry quota.

Comcast does not suggest that significant viewing status necessarily be the exclusive method used by the Commission for

determining a local presence by an out of ADI station. Our contention is that the attainment of significant viewing status should establish an irrebuttable basis for such finding.[3]

II. THE COMMISSION SHOULD ESTABLISH AN EARLY DEADLINE FOR RETRANSMISSION CONSENT ELECTION

In establishing procedures for retransmission consent, the Commission must not underestimate the enormity of the task facing cable operators. Congress, in its wisdom, has determined that commencing October 6, 1993 no cable system may retransmit the signal of a broadcast without that station's consent. For Comcast, the operator of sixty-three cable systems, this means it must be prepared to potentially negotiate close to 500 carriage agreements. These negotiations must be concluded -- one way or the other -- by October 5.

Since the cable operator will not know how many negotiations it faces until broadcasters make their election between retransmission consent and must carry, it is absolutely essential that the Commission require broadcasters to make this election at the earliest possible date. Even if stations are required to make their election the week following the Commission's Order in this Docket, the parties will barely have six months until the October 6th deadline in which to conclude their discussions.

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[3]Stations originating outside a market but which enjoy significant viewing in the market, by definition, provide events and programming of interest to local viewers.

Comcast submits that the last reasonable date by which stations should be permitted to make their election is thirty days from the Commission's Order in this proceeding. Since the Act's adoption in October, 1992, broadcasters have been aware of the necessity of having to make such an election. By April, 1993, a broadcaster will have enjoyed at least as long -- and almost certainly longer -- an amount of time to ruminate on its options as will be left to the parties within which to hammer out these unprecedented agreements. In short, there is no plausible reason why any station requires more than 30 days from the date of the Commission's Order to declare its election and every reason to give the parties the greatest amount of time in which to negotiate, since that time will be brief in any event.

III. AMBIGUITIES RELATING TO THE QUALIFICATION OF LOW POWER STATIONS FOR MUST CARRY SHOULD BE DISPELLED

Section 614(h)(2) of the Act sets forth the circumstances under which a low-power television station may be eligible to assert must carry rights. Low-power stations become qualified only in extremely limited circumstances and only if a series of six criteria enumerated by the statute are satisfied. With that in mind, it is necessary for the Commission to clarify several points.

Specifically, two items in Section 614(h)(2)(F) are subject to misinterpretation.[4] Potential confusion is caused by the statute's syntax which refers to a singular county even though many cable systems serve more than one county from a common headend. In those instances where a single technically-integrated cable system serves multiple counties, the statute's syntax should similarly be interpreted as plural. In other words, where a cable system serves any community to which one or more full power stations are licensed, low power television stations will not qualify for carriage on the system.[5]

The Commission should also confirm that the term "full power television broadcast station" includes both commercial and non-commercial stations. We know this to be true because in section 614 of the Act, Congress created a special definition -- "local commercial television station" -- for the purpose of referring exclusively to full-power commercial stations within a cable market. Had it intended to limit the circumstances in subsection

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[4]The statute reads in pertinent part:

> "The term 'qualified low power station' means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if - ...
>
> (F) There is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

[5]Likewise, in Section 614(h)(2)(E), the phrase "franchise area" should be interpreted as encompassing all franchise areas served by a single system.

(h)(2)(F) to commercial stations, Congress would have used the term "local commercial television station".[6]

One of the criteria for low-power qualification as a must carry is that the station address the local news and informational needs of the market in a way which are not being addressed by full-power stations.[7] Comcast is concerned that in the absence of objective standards, a cable operator may be chilled from making a good faith assessment that a particular low power station does not meet the statutory standard for fear that it will be subject to sanctions if the Commission ultimately disagrees with its judgment. Therefore, we respectfully suggest that in the event the Commission decides to measure the adequacy of low power television stations' local programming on a case-by-case basis, it should assure cable operators that they do not risk penalties for any case in which a good faith dispute exists. Relief in such cases should be limited to an order mandating carriage by the cable system.

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[6]We note that the Commission's definition of the term "television broadcast station" in part 76 of its rules includes both commercial and non-commercial stations. 47 C.F.R. 76.5(b).

[7]Section 614(h)(2)(B). The Notice states the Commission's tentative conclusion that it need not establish objective standards for determining when a low-power television station meets these needs. Rather the Commission's tentative assessment is that it need only address this issue in the context of contested proceedings.

IV. IN REVISING THE TOP 100 MARKET LIST THE COMMISSION SHOULD PRESERVE LONG ESTABLISHED VIEWING PATTERNS.

The Commission has invited comment with regard to the Act's requirement that it revise its list of the top 100 broadcast markets which are contained in Section 76.51 of the Commission's rules ("Top 100 Market List"). For this purpose, the Commission is reopening Docket 87-24 for further comments and reply comments. Since Comcast has already commented in Docket 87-24 regarding the need and methodology which should be used to revise the Top 100 Market List, it is not necessary for it to repeat those comments at length here.[8] Comcast, however, reiterates its concern that the Commission remain cognizant of the copyright implications resulting from revision of the Top 100 Market List.[9]

Although it is unclear whether a revised list would be incorporated into the compulsory license, the Commission must recognize that possibility. Should the list be used for copyright purposes, any system located in a market which is deleted from the Top 100 Market List will lose the right to import a second distant independent signal into its market on a permitted basis.[10] Therefore, in order to preserve established viewing patterns, the

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[8]A copy of Comcast's comments in Docket 87-24 are attached hereto for the Commission's convenience.

[9]As part of the Commission's 1972 signal carriage rules, the Top 100 Market List is incorporated into the cable compulsory license contained in Section 111 of the Copyright Act of 1976.

[10]Although systems may continue to import a second independent signal on a non-permitted basis, its rate is 600% higher than the permitted rate and thus the cost of continued carriage on a non-permitted basis is prohibitive.

Commission should, in any revision, grandfather all existing Top 100 Markets or, at a minimum, the existing signal carriage in systems located within the current Top 100 Markets.

Respectfully submitted,

COMCAST CORPORATION

Thomas R. Nathan
Deputy General Counsel

Dated: December 31, 1992

ATTACHMENT "A"

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries	)	Gen. Docket No. 87-24

To the Commission:

COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast"), by its attorneys, hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking, 53 Fed. Reg. 43736 (1988) ("Further Notice"), in the above-captioned proceeding. Comcast limits its comments to the proposed redesignation of the top 100 broadcast markets listed in Section 76.51 of the Commission rules, 47 C.F.R. Section 76.51 (the "Top 100 Market List" or the "List"), as invited by paragraphs 35-37 of the Further Notice. Comcast submits that the proposed redesignation is necessary, given the dramatic changes that have taken place in the nearly twenty years since the rule was promulgated. These dramatic changes are perhaps best illustrated by reference to the West Palm Beach, Florida market, in which Comcast owns a cable television system.

The Purpose of the Top 100 Market List

When the Commission first designated the top 100 markets in 1972, it was in connection with a series of signal carriage rules governing cable television, including the now deleted must-carry and distant signal regulations. In striking a balance between the competing goals of increased diversity of programming and the protection of local broadcasters, the Commission fashioned different distant signal importation rules for cable operators in major television markets and smaller television markets. Cable Television Report and Order, 36 F.C.C.2d 143, 177-178 (1972). Because broadcast stations in larger markets are generally stronger financially and need less protection from distant broadcast competition, cable systems in the top 100 markets were permitted to import additional distant signals and thus further the diversity of information available to the public. The Commission concluded that this would meet the goal of greater diversity, with little adverse affect to broadcasters in those major markets.1/

1/ Cable Television Report and Order, 36 F.C.C.2d at 177-178 (1972). See generally Reconsideration of Cable Television Report and Order, 36 F.C.C.2d 326 (1972). The FCC eliminated the must-carry and distant signal limitations for cable television. See Report and Order in Docket Nos. 20988 and 21284, 79 F.C.C.2d 663, aff'd Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981). However, the public policy of protecting small market broadcasters lived on in

(continued...)

The Relevance of the Top 100 Market List to the Federal Copyright Regulatory Scheme

In addition to the continuing significance of the Top 100 Market List for FCC regulatory purposes (e.g., in connection with the network nonduplication, syndicated exclusivity and territorial exclusivity rules), the List has great significance to the cable industry for other reasons. Specifically, the cable television copyright compulsory license provided in Section 111 of the Copyright Act of 1976, as amended, incorporates by reference the old FCC signal carriage rules, including the Top 100 Market List, as the cornerstone of the cable compulsory licensing scheme. For example, former FCC rule Section 76.61 would have permitted systems located in top 100 markets to import a market quota of either two or, on rare occasions, three distant independent signals. Pursuant to rules promulgated by the U.S. Copyright Office (the "Copyright Office"), a cable system in a top 100 market is entitled to import an equal number of distant independent signals without imposition of the extremely high 3.75% royalty rate. The 3.75% rate is reserved for carriage of distant signals that would not have been permitted under the old FCC distant signal carriage

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1/ (...continued)
the Copyright Act, which, as is noted in the next section of these comments, incorporates the old FCC rules into the copyright royalty scheme.

limitations. On the other hand, systems in smaller television markets would only have been permitted to import one distant independent signal (or sometimes none at all) under now-deleted FCC rule Section 76.59. As a result, small market systems now must pay the 3.75% copyright royalty rate for carriage of any distant independent signals over that very limiting quota. The List thus continues to have a significant effect upon the shape of cable operators' signal carriage offerings.

Modifying the List to reflect current realities will have a beneficial impact upon cable television signal carriage, and updating the List will ensure that the scheme better serves the public interest. The Commission has previously recognized and considered the rule's impact on areas such as copyright and signal carriage issues. See, Major Television Markets, (Fresno-Visalia, Calif.) 57 R.R.2d 1122, 1124 (1985); Major Television Markets, (Orlando-Daytona Beach-Melbourne-Cocoa, Fla.) 102 F.C.C.2d 1062, 1073-1075, 1077 (1985). See also, CATV Rules-Designation of TV Market, 47 F.C.C.2d 752 (1974). Further Notice at paragraph 37. Because the List is no longer accurate, because it plays an important role in the federal regulation of cable television, and because there is no other forum for redressing the

current inaccuracies in the List,[2/] the Commission should now modify Section 76.51 so that it accurately reflects current market positions and the current realities of the marketplace.

Changed Circumstances Require Modification of Section 76.51 of the Commission's Rules

As the Commission has noted, at least eleven markets included in Section 76.51 are no longer ranked in the top 100 markets (and, by implication, eleven new markets would now be included). Further Notice at paragraph 36. Moreover, to the extent that there have been dramatic changes in market size and status, the policies which dictated the Commission's original Top 100 Market List are no longer being served. Because of changed circumstances, the Commission is required to take a "hard look" at Section 76.51 and the reasons advanced for its modification. See KCST-TV v. FCC, 699 F.2d 1185, 1191 (D.C. Cir. 1983) (deletions from the 1972 list of significantly viewed television stations). See also,

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2/ Through its counsel, Comcast has discussed -- with senior staff at both the Commission's Mass Media Bureau and the Copyright Office General Counsel's Office -- the fact that the List is terribly dated in the case of West Palm Beach. While the staff at both agencies expressed sympathy for and an understanding of the problem, neither agency's staff was willing to act upon any of Comcast's specific suggestions to remedy the problem or to formulate any new proposals. The staff at each agency believes that it is powerless to deal with this problem. Only the full Commission appears to have the power to provide a remedy.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

The West Palm Beach market offers the most striking example of these changed circumstances. While it was not included in the original Top 100 Market List, in the intervening 16 years West Palm Beach has grown to be the 53rd largest television market, as indicated by Arbitron in its 1988 ratings. In 1987, local television broadcasters generated approximately $42.7 million of revenue. Paul Kagan, Broadcast Stats, January 18, 1988 at 3. The market population is now approaching 750,000 and the median household income exceeds $16,000.[3/] In addition, there are a total of seven television stations licensed to a market which continues to grow at a pace that ranks it among the three fastest-growing metropolitan areas in the nation.[4/] In such a market -- which is on the verge of becoming a top 50 market -- local broadcasters no longer need the protection afforded to small market broadcasters. Rather, West Palm

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3/ U.S. Department of Commerce, Bureau of Census, State and Metropolitan Area Data Book 1986: Area and Population Table A at 62, Personal Income Table A at 73.

4/ Paul Kagan, Broadcast Stats, February 29, 1988, at 1, 4; Endicott, 100 Leading U.S. Markets, ADVERTISING AGE, December 8, 1986 at S-2. In 1972 the West Palm Beach market had a total of 171,000 television households; in 1988, there are over 462,000 television households. 1972 Broadcasting Yearbook at 35, 38; 1988 Broadcasting/Cablecasting Yearbook at C-213, C-217.

Beach broadcasters should be treated in a manner similar to similarly-situated broadcasters in large television markets. By the same token, West Palm Beach cable operators should be equally able to provide, and consumers in the West Palm Beach market should be entitled to receive, the benefits of increased diversity of programming, in much the same manner available in markets of similar size. Yet, because Section 76.51 reflects market designations as they existed in 1972, cable operators in the West Palm Beach market are strongly discouraged, by the imposition of the high 3.75% rate fees, from importing distant signals and increasing diversity as was originally intended. See Report and Order, 36 F.C.C.2d at 177-178.5/ The Commission's original policies still make sense, but the facts have outrun them. A change is needed to restore the purpose to these FCC rules.

Comcast does not suggest that the List of top markets should be modified often. In fact, Comcast acknowledges that a certain stability is necessary if both cable operators and broadcasters are to be able to make long-

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5/ Accordingly, the Commission should not only redesignate the top 100 markets, but should also recommend that, for the purpose of determining cable copyright fees, the Copyright Office should adhere to the List as modified. The Copyright Office has already indicated a willingness to recognize such a modification in a similar situation. See Policy Decision, Cable Copyright License, 52 Fed. Reg. 28362, 28363 (July 29, 1987)(effect of a major market redesignation in 1985 upon copyright royalty analysis).

term commitments and best serve their communities. Rather, Comcast suggests that the List should be updated at regular intervals every ten or fifteen years, as the Commission may determine best advances the public interest, to account for the inevitable shifts and changes that occur in population and market size.[6/] Once the Commission determines the intervals at which the List of top markets should be updated, objective criteria, such as Arbitron and Nielsen ratings and population trends, should be taken into account before a modification is made.[7/]

6/ Certainly the FCC has recognized the need to reflect an accurate list of top 100 markets, and has added to hyphenated markets when appropriate. E.g., Major Television Markets, (Fresno-Visalia, Calif.) 57 R.R.2d 1122 (1985); Major Television Markets, (Orlando-Daytona Beach-Melbourne-Cocoa, Fla.) 102 F.C.C.2d 1062 (1985); CATV Rules-Designation of TV Market, 47 F.C.C.2d 752 (1974). Moreover, the Commission is able to make such amendments with little difficulty in similar situations. For example, the Commission regularly amends its list of top 50 markets subject to the prime time access rule pursuant to Section 73.658(k) of the Commission's rules. See, e.g., Public Notice No. 2843 (April 17, 1987)(designating the top 50 markets for 1989-1992). The determinations are based upon Arbitron data.

7/ There are two practical and fair approaches to grandfathering for television markets that have been on the Top 100 Market List, but which may drop off a new list of the top 100 markets. The first would be to grandfather the entire market, and treat the market for all purposes as though it continues to be a top 100 television market. The second, and narrower, alternative would be to grandfather specific situations, i.e., specific pre-existing signal carriage on specific systems. In either case, in the signal carriage area, there is a time-honored tradition of grandfathering, and it could certainly be accomplished in this case with little confusion or harm.

Conclusion

Comcast urges the Commission to update the list of top 100 television markets in Section 76.51 of the Commission's rules, to reflect changes that have occurred in the nearly twenty years since the List was compiled. The Commission is the only forum at which this important problem can be addressed. This modification will give full effect to long-standing FCC policy and Congressional intent and will allow broadcasters and cable operators to serve the public more effectively.

Respectfully submitted,

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January 17, 1988